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**BRUCE ALBERT JOHNSON**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

BRUCE ALBERT JOHNSON,

Plaintiff,  
v.

CFS II, INC., an Oklahoma corporation,

**Defendant.**

Case No. 5:12-CV-01091-LHK-PSG

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
CFS II, INC.'S, MOTION TO DISMISS  
THE COMPLAINT**

Hearing Date: TBD  
Hearing Time: 1:30 p.m.  
Hearing Judge: Lucy H. Koh  
Hearing Courtroom: 8, 4<sup>th</sup> Floor  
Hearing Location: 280 South First Street  
San Jose, California

COMES NOW Plaintiff, BRUCE ALBERT JOHNSON, by and through his attorney Fred W. Schwinn of Consumer Law Center, Inc., and hereby submits his Memorandum of Points and Authorities in Opposition to CFS II, Inc.'s, Motion to Dismiss the Complaint (Doc. 5).

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## **I. INTRODUCTION**

This is an action for statutory damages, attorney fees and costs brought by an individual consumer for Defendant, CFS II, INC.’s (hereinafter “Defendant”), violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (hereinafter “FDCPA”), and the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788 *et seq.* (hereinafter “RFDCPA”) which prohibit debt collectors from engaging in abusive, deceptive and unfair practices.

Plaintiff's Complaint sufficiently alleges facts that, if established at trial, would entitle him to relief against Defendant for numerous violations of the FDCPA and RFDCPA, any one of which exposes Defendant to liability. Therefore, Plaintiff respectfully requests that this Court deny Defendant's Motion to Dismiss in its entirety and find that Plaintiff's Complaint states claims upon which relief may be granted by this Honorable Court.

## **II. STATEMENT OF THE CASE**

On a date or dates unknown to Plaintiff, BRUCE ALBERT JOHNSON (hereinafter “Plaintiff”), is alleged to have incurred a financial obligation, namely a consumer credit account issued by US Bank (hereinafter “the alleged debt”). The alleged debt was incurred primarily for personal, family or household purposes and is therefore a “debt” as that term is defined by 15 U.S.C. § 1692a(5) and a “consumer debt” as that term is defined by Cal. Civil Code § 1788.2(f).<sup>1</sup> Sometime thereafter on a date unknown to Plaintiff, the alleged debt was consigned, placed or otherwise transferred to Defendant for collection from Plaintiff.<sup>2</sup>

Thereafter, Defendant sent a collection letter (Exhibit “1”) to Plaintiff which is a “communication” in an attempt to collect a debt as that term is defined by 15 U.S.C. § 1692a(2).<sup>3</sup> The

<sup>1</sup> Complaint (Doc. 1) at ¶ 8.

<sup>2</sup> Complaint (Doc. 1) at ¶ 9.

<sup>3</sup> Complaint (Doc. 1) at ¶ 10, Exhibit “1.”

1 collection letter (Exhibit "1") is dated March 4, 2011.<sup>4</sup> The collection letter (Exhibit "1") was the first  
 2 written communication from Defendant to Plaintiff in connection with the collection of the alleged  
 3 debt.<sup>5</sup> The collection letter (Exhibit "1") states in relevant part:  
 4

To help you identify this debt we have provided above the name and address of the original creditor and other information. If you need more information, just let us know. Also, if you believe this is not your debt, that the amount is wrong, or if there is something else that may make this debt invalid, please tell us you dispute the debt. If you tell us of your dispute within 30 days of your receipt of this letter, we will avoid contacting you until we send written verification of the debt or a copy of any applicable judgment. If you do not tell us you dispute the debt then we will assume the debt is valid.<sup>6</sup>

In this case, Plaintiff alleges that Defendant failed to send Plaintiff a written notice containing a statement that unless Plaintiff, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by Defendant, in violation of 15 U.S.C. § 1692g(a)(3).<sup>7</sup> By failing to include this notice, Defendant also misrepresented Plaintiff's right to dispute the debt, in violation of 15 U.S.C. §§ 1692e and 1692e(10).<sup>8</sup>

Plaintiff further alleges that Defendant failed to send Plaintiff a written notice containing a statement that if Plaintiff notifies Defendant in writing within the thirty-day period that the debt, or any portion thereof, is disputed, Defendant would obtain verification of the debt and that a copy of the verification would be mailed to Plaintiff, in violation of 15 U.S.C. § 1692g(a)(4).<sup>9</sup> By failing to include this notice, Defendant also misrepresented Plaintiff's right to obtain verification of the debt, in violation of 15 U.S.C. §§ 1692e and 1692e(10).<sup>10</sup>

Plaintiff further alleges that Defendant failed to send Plaintiff a written notice containing a

<sup>4</sup> Complaint (Doc. 1) at ¶ 12.

<sup>5</sup> Complaint (Doc. 1) at ¶ 13.

<sup>6</sup> Complaint (Doc. 1) at ¶ 14, Exhibit "1."

<sup>7</sup> Complaint (Doc. 1) at ¶ 21b.

<sup>8</sup> Complaint (Doc. 1) at ¶ 21a.

<sup>9</sup> Complaint (Doc. 1) at ¶ 21d.

<sup>10</sup> Complaint (Doc. 1) at ¶ 21c.

1 statement that upon Plaintiff's written request within the thirty-day period, Defendants would provide  
 2 Plaintiff with the name and address of the original creditor, if different from the current creditor, in  
 3 violation of 15 U.S.C. § 1692g(a)(5).<sup>11</sup> By failing to include this notice, Defendant also misrepresented  
 4 Plaintiff's right to obtain the name and address of the original creditor, if different from the current  
 5 creditor, in violation of 15 U.S.C. §§ 1692e and 1692e(10).<sup>12</sup>

7 Additionally, each of Plaintiff's allegations enumerated above states a violation of Cal. Civil  
 8 Code § 1788.17.<sup>13</sup> Plaintiff further alleges that Defendant's acts as described above were done willfully  
 9 and knowingly with the purpose of coercing Plaintiff to pay the alleged debt, within the meaning of Cal.  
 10 Civil Code § 1788.30(b).<sup>14</sup>

### **III. POINTS AND AUTHORITIES**

13 Defendant, CFS II, INC., moves to dismiss Plaintiff's claims under the federal Fair Debt  
 14 Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, ("FDCPA") and the California Rosenthal Fair Debt  
 15 Collection Practices Act, Cal. Civil Code § 1788 *et seq.*, ("RFDCPA") pursuant to Fed. R. Civ. P. 12(b)  
 16 (6). In his Complaint, Plaintiff has stated facts sufficient to overcome Defendant's Motion to Dismiss  
 17 pursuant to Fed. R. Civ. P. 12(b)(6).

#### **A. STANDARD OF REVIEW**

20 A Fed. R. Civ. P. 12(b)(6) motion to dismiss tests the sufficiency of the complaint.<sup>15</sup> "To avoid  
 21 dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint 'sufficient factual matter, accepted  
 22 as true, to state a claim to relief that is plausible on its face.'"<sup>16</sup> In this regard, the pleading standard of

24 <sup>11</sup> Complaint (Doc. 1) at ¶ 21f.

25 <sup>12</sup> Complaint (Doc. 1) at ¶ 21e.

26 <sup>13</sup> Complaint (Doc. 1) at ¶ 29.

<sup>14</sup> Complaint (Doc. 1) at ¶ 30.

<sup>15</sup> *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

<sup>16</sup> *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009), *rev'd on other grounds*, *Ashcroft v. al-Kidd*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2074 (2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)).

1 Rule 8(a)(2) requires a “short and plain statement of the claim showing that the pleader is entitled to  
 2 relief.”<sup>17</sup> The requisite “showing” is not just “a blanket assertion[] of entitlement to relief.”<sup>18</sup> Factual  
 3 allegations in the complaint must provide fair notice of the nature of the claim and grounds on which  
 4 the claim rests.<sup>19</sup> As long as the complaint meets this standard, it need not include the facts necessary to  
 5 carry the plaintiff’s burden,<sup>20</sup> or detailed factual allegations.<sup>21</sup>

7 In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court analyzes the  
 8 Complaint and takes “all allegations of material fact as true and construe(s) them in the lights most  
 9 favorable to the non-moving party.”<sup>22</sup> Dismissal may be based on a lack of a cognizable legal theory or  
 10 on the absence of facts that would support a valid theory.<sup>23</sup> A complaint must “contain either direct or  
 11 inferential allegations respecting all the material elements necessary to sustain recovery under some  
 12 viable legal theory.”<sup>24</sup> The factual allegations must be definite enough to “raise a right to relief above  
 13 the speculative level.”<sup>25</sup> However, a complaint does not need detailed factual allegations to survive  
 14 dismissal.<sup>26</sup> Rather, a complaint need only include enough facts to state a claim that is “plausible on its  
 15 face.”<sup>27</sup> That is, the pleadings must contain factual allegations “plausibly suggesting (not merely  
 16 consistent with)” a right to relief.<sup>28</sup> However, “Rule 8(a) ‘does not impose a probability requirement at  
 17 the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will  
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 21     <sup>17</sup> Fed. R. Civ. P. 8(a)(2).  
 22     <sup>18</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

23     <sup>19</sup> *Id.*

24     <sup>20</sup> *al-Kidd*, 580 F.3d at 977.

25     <sup>21</sup> *Twombly*, 550 U.S. at 555.

26     <sup>22</sup> *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

27     <sup>23</sup> *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

28     <sup>24</sup> *Twombly*, 550 U.S. at 562 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

29     <sup>25</sup> *Id.* at 555.

30     <sup>26</sup> *Id.* at 552.

31     <sup>27</sup> *Id.* at 570.

32     <sup>28</sup> *Id.* at 556 (noting that this requirement is consistent with Fed. R. Civ. P. 8(a)(2), which requires that  
 33 the pleadings demonstrate that “the pleader is entitled to relief”).

1 reveal evidence' to support the allegations."<sup>29</sup>

2 Finally, if granting a motion to dismiss, the court is generally required to grant the plaintiff  
 3 leave to amend, even if no request to amend the pleading was made, unless amendment would be  
 4 futile.<sup>30</sup> In determining whether amendment would be futile, the court examines whether the complaint  
 5 could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of  
 6 [the] original complaint."<sup>31</sup> Leave to amend should be liberally granted, but an amended complaint  
 7 cannot allege facts inconsistent with the challenged pleading.<sup>32</sup>

### 9           **1.       Least Sophisticated Consumer Standard**

10          The FDCPA states that its purpose, in part, is "to eliminate abusive debt collection practices by  
 11 debt collectors."<sup>33</sup> The statute is designed to protect consumers from unscrupulous collectors, whether  
 12 or not there is a valid debt.<sup>34</sup> The FDCPA broadly prohibits unfair or unconscionable collection  
 13 methods; conduct which harasses, oppresses or abuses any debtor; and any false, deceptive or  
 14 misleading statements, in connection with the collection of a debt.<sup>35</sup> The stated purpose of the Act is to  
 15 "protect consumers from a host of unfair, harassing, and deceptive debt collection practices. . . ."<sup>36</sup>

16          The United States Court of Appeals for the Ninth Circuit has held that whether a communication  
 17 or other conduct violates the FDCPA is to be determined by analyzing it from the perspective of the  
 18 "least sophisticated consumer."<sup>37</sup> The "least sophisticated consumer" standard is objective—not  
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22          <sup>29</sup> *Starr v. Baca*, 633 F.3d 1191, 1205 (9th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556).

23          <sup>30</sup> *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

24          <sup>31</sup> *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990).

25          <sup>32</sup> *Id.* at 296-97.

26          <sup>33</sup> 15 U.S.C. § 1692(e).

27          <sup>34</sup> *Baker v. G.C. Services*, 677 F.2d 775, 777 (9th Cir. 1982).

28          <sup>35</sup> 15 U.S.C. §§ 1692d, 1692e, and 1692f.

29          <sup>36</sup> *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1149 (9th Cir. 1998) (quoting S. Rep. No. 95-382, 95th Cong. 1st Sess. 2 (1977)).

30          <sup>37</sup> *Terran v. Kaplan*, 109 F.3d 1428, 1431 (9th Cir. 1997); *Swanson v. Southern Oregon Credit Serv.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

1 subjective.<sup>38</sup> Courts determine whether the “least sophisticated consumer” would be misled or deceived  
 2 by the statements made by a debt collector as a matter of law.<sup>39</sup>

3       “As the FDCPA is a strict liability statute, proof of one violation is sufficient to support  
 4 summary judgment for the plaintiff.”<sup>40</sup> “The FDCPA is a strict liability statute; there is no mental state  
 5 required to violate it.”<sup>41</sup> “Because the Act imposes strict liability, a consumer need not show intentional  
 6 conduct by the debt collector to be entitled to damages.”<sup>42</sup> Furthermore, the question of whether the  
 7 consumer owes the alleged debt has no bearing on a suit brought pursuant to the FDCPA.<sup>43</sup>

8  
 9       It is important to note that by protecting consumers from abusive, deceptive and unfair  
 10 collection practices, the FDCPA insures that those debt collectors who refrain from using abusive debt  
 11 collection practices are not competitively disadvantaged.<sup>44</sup> Moreover, the FDCPA further insures that  
 12 regardless of whether a consumer owes a debt, he or she will be treated in a reasonable and in a civil  
 13 manner.<sup>45</sup>

14  
 15       Accordingly, Plaintiff asserts that whether or not Defendant violated the FDCPA must be  
 16 evaluated from the standpoint of the “least sophisticated consumer.”

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19       <sup>38</sup> *Swanson*, 869 F.2d at 1227.

20       <sup>39</sup> *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996); *Terran*, 109 F.3d at 1432;  
 21 *Swanson*, 896 F.2d at 1225-26.

22       <sup>40</sup> *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990); See also *Stojanovski v. Strobl &*  
*Manoogian, P.C.*, 783 F. Supp. 319, 323 (E.D. Mich. 1992); *Riveria v. MAB Collections*, 682 F. Supp.  
 174, 178-9 (W.D.N.Y. 1988).

23       <sup>41</sup> *Cruz v. Int'l Collection Corp.*, 673 F.3d 991 (9th Cir. 2012), citing *McCollough v. Johnson,*  
*Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) and *Clark v. Capital Credit &*  
*Collection Servs.*, 460 F.3d 1162, 1175 (9th Cir. 2006).

24       <sup>42</sup> *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996); See also *Taylor v. Perrin Landry, deLaunay*  
*& Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60,  
 62 (2nd Cir. 1993); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

25       <sup>43</sup> *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Baker*, 677 F.2d at 777.

26       <sup>44</sup> 15 U.S.C. § 1692(e); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, \_\_\_ U.S. \_\_\_, 130 S.  
 Ct. 1605, 1608-09, 176 L. Ed. 2d 519 (2010); *McCollough*, 637 F.3d at 939.

27       <sup>45</sup> *Baker*, 677 F.2d at 777.

1           **2. Under the Strict Liability Standard of the FDCPA, Plaintiff Has Pled  
2           Numerous Violations of the FDCPA, as Seen from the Perspective of  
the “Least Sophisticated Consumer”**

3           To establish a violation of the FDCPA, one need only show that: (1) the plaintiff has been the  
4           object of collection activity arising from a consumer debt, (2) the defendant is a “debt collector” as  
5           defined in the FDCPA, and (3) the defendant has engaged in any act or omission in violation of the  
6           prohibitions or requirements of the Act.<sup>46</sup> Plaintiff has sufficiently pled facts which support each of  
7           these elements: (1) Plaintiff is a consumer,<sup>47</sup> (2) Defendant is a debt collector,<sup>48</sup> and (3) Defendant  
8           violated various sections of the FDCPA.<sup>49</sup>

9           Because the FDCPA is a strict liability statute, proof of one violation is sufficient to defeat a  
10          motion to dismiss and support summary judgment for a plaintiff.<sup>50</sup> In light of this strict liability  
11          standard, a consumer need not show intentional conduct by the debt collector in order to be entitled to  
12          damages,<sup>51</sup> and there are no unimportant violations.<sup>52</sup> Further, no proof of deception or actual damages  
13          is required to obtain statutory remedies.<sup>53</sup>

14           **B. MOTIONS TO DISMISS ARE DISFAVORED BY THE COURTS**

15           The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the claims made by

20          <sup>46</sup> *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468, 469 (D. N.M. 1990); *Riveria*, 682 F. Supp.  
21          at 175-76; *Withers v. Eveland*, 988 F. Supp. 942, 945 (E.D. Va. 1997); *Whatley v. Universal Collection  
Bureau, Inc.*, 525 F. Supp. 1204, 1206 (N.D. Ga. 1981).

22          <sup>47</sup> Complaint (Doc. 1) at ¶¶ 6,18, and 26.

23          <sup>48</sup> Complaint (Doc. 1) at ¶¶ 7, 19, and 27.

24          <sup>49</sup> Complaint (Doc. 1) at ¶¶ 10, 13-14, 21-23, 29-33.

25          <sup>50</sup> See *Hartman v. Meridian Financial Services, Inc.*, 191 F. Supp. 2d 1031, 1046-47 (W.D. Wis. 2002)  
26          (“One false or misleading statement in a collection letter renders the entire communication false or  
misleading and constitutes one violation”); See also *Cacace*, 775 F. Supp. at 505; *Traverso v. Sharinn*,  
1989 U.S. Dist. LEXIS 19100, \*4 (D. Conn. Sept. 15, 1989); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d  
446, 451 (8th Cir. 2001); *Bentley*, 6 F.3d at 62.

27          <sup>51</sup> See *Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.*, 969 F. Supp. 609, 613 (D. Nev. 1997).

28          <sup>52</sup> *Bentley*, 6 F.3d at 63 (no non-actionable violations of FDCPA); *Taylor*, 103 F.3d at 1234 (failure “to  
comply with any provision of the FDCPA” leads to liability).

<sup>53</sup> *Baker*, 677 F.2d at 780.

1 Plaintiff.<sup>54</sup> Plaintiff's Complaint need only allege facts that, if established at trial, would entitle her to  
 2 relief.<sup>55</sup> Therefore, a Rule 12(b)(6) motion may only be granted if the operative complaint fails to  
 3 allege either (1) a cognizable legal theory, or (2) absence of sufficient facts alleged under a cognizable  
 4 legal theory.<sup>56</sup> In this case, Plaintiff's Complaint establishes both. Additionally, the facts alleged must  
 5 state a facially plausible claim for relief, pursuant to *Twombly/Iqbal*.<sup>57</sup> Plaintiff's Complaint does.  
 6

7 Traditionally, Rule 12(b)(6) motions have been disfavored by the courts. Because pleadings  
 8 play a lesser role in federal practice than they do elsewhere, and because there is a liberal amendment  
 9 policy in federal courts, judges are rightfully apprehensive when asked to dismiss a case pursuant to  
 10 Rule 12(b)(6).<sup>58</sup>

11 In deciding a Rule 12(b)(6) motion to dismiss, the Court must "accept as true all of the factual  
 12 allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most  
 13 favorable to plaintiff, and construe the complaint liberally."<sup>59</sup> No matter how improbable the facts  
 14 alleged are, they must be accepted as true for purposes of this motion.<sup>60</sup>

### 16 C. THE 15 U.S.C. § 1692g(a) DEBT VALIDATION NOTICE

17 "There are numerous and ingenious ways of circumventing § 1692g under a cover of a technical  
 18 compliance."<sup>61</sup> In this case, Defendant failed to include the notices required by 15 U.S.C. §§ 1692g(a)  
 19 (3), 1692g(a)(4), and 1692g(a)(5), in its initial written collection communication to Plaintiff. "The Fair  
 20 Debt Collection Practices Act is an extraordinarily broad statute. Congress addressed itself to what it  
 21

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22 <sup>54</sup> *De La Cruz v. Tormey*, 582 F.2d 45, 58 (9th Cir. 1978); *SEC v. Cross Fin'l Servs., Inc.*, 908 F. Supp. 23 718,726-727 (C.D. Cal. 1995); *Beliveau v. Caras*, 873 F. Supp. 1393, 1395 (C.D. Cal. 1995).

24 <sup>55</sup> *Twombly*, 550 U.S. at 555.

25 <sup>56</sup> See generally, *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

26 <sup>57</sup> *Id.*

27 <sup>58</sup> See *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) and *Bream v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

28 <sup>59</sup> *Rescuedcom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). See also, *al-Kidd*, 580 F.3d at 956.

<sup>60</sup> *Twombly*, 550 U.S. at 556.

<sup>61</sup> *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482, 485 (4th Cir. 1991).

1 considered to be a widespread problem, and to remedy that problem it crafted a broad statute.”<sup>62</sup> “To  
 2 ensure that debt collectors give consumers adequate information concerning their legal rights, section  
 3 1692g(a) requires that the initial communication with a consumer in connection with a debt contain:  
 4

5                 (1) the amount of the debt; (2) the name of the creditor; (3) a statement  
 6 that [unless] the consumer, within thirty days after receipt of the notice,  
 7 disputes the validity of the debt, or any portion thereof, the debt will be  
 8 assumed to be valid by the debt collector; (4) a statement that if the  
 9 consumer disputes the debt, the debt collector will mail the consumer  
 10 verification of the debt or a copy of a judgment; and (5) a statement that,  
 11 upon the consumer’s written request, the debt collector will provide the  
 12 consumer with the name and address of the original creditor, if different  
 13 from the current creditor.”<sup>63</sup>

14 “Paragraphs 3 through 5 of section 1692g(a) contain the validation notice—the statements that  
 15 inform the consumer how to obtain verification of the debt and that he has thirty days in which to do  
 16 so.”<sup>64</sup> A “validation notice” is required by law to be present in letters seeking to collect debts.<sup>65</sup>  
 17 Essentially, the notice required by § 1692g must tell the debtor that he has 30 days to dispute the  
 18 validity of all or a portion of the debt. If not disputed, the collector may assume the debt to be valid.<sup>66</sup>  
 19 “A debt validation notice, to be valid, must be effective, and it cannot be cleverly couched in such a  
 20 way as to eviscerate its message.”<sup>67</sup> Moreover, “it is implicit that the debt collector may not defeat the  
 21 statute’s purpose by making the required disclosures in a form or within a context in which they are  
 22 unlikely to be understood by the unsophisticated debtors who are the particular objects of the statute’s  
 23 solicitude.”<sup>68</sup>

### 24                 1. The Validation Notice Must be Effectively Conveyed to the Debtor

25                 “The statute is not satisfied merely by inclusion of the required debt validation notice; the notice

26                 <sup>62</sup> *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992).

27                 <sup>63</sup> *Terran*, 109 F.3d at 1431; See 15 U.S.C. § 1692g(a)(1)-(5).

28                 <sup>64</sup> *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000).

29                 <sup>65</sup> 15 U.S.C. § 1692g.

30                 <sup>66</sup> *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996).

31                 <sup>67</sup> *Id.*

32                 <sup>68</sup> *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997).

1 Congress required must be conveyed effectively to the debtor. It must be large enough to be easily read  
 2 and sufficiently prominent to be noticed—even by the least sophisticated debtor. Furthermore, to be  
 3 effective, the notice must not be overshadowed or contradicted by other messages or notices appearing  
 4 in the initial communication from the collection agency.”<sup>69</sup>  
 5

6 **2. The Complaint Sufficiently Alleges Facts to State a Claim Under 15 U.S.C. §**  
**1692g(a)(3).**

7 Defendant argues that there is no violation of 15 U.S.C. § 1692g(a)(3) because the letter  
 8 contained all statutorily required information. Plaintiff disagrees. As stated above, the notice required  
 9 by § 1692g(a)(3) must convey to the least sophisticated debtor:

10        . . . a statement that unless the consumer, within thirty days after receipt  
 11 of the notice, disputes the validity of the debt, or any portion thereof, the  
 12 debt will be assumed to be valid by the debt collector[.]<sup>70</sup>

13 Interpreting the statute so as “to give each word some operative effect,”<sup>71</sup> there are five  
 14 component parts in § 1692g(a)(3) with which a debt collector must comply. To comply with §  
 15 1692g(a)(3), the initial collection communication from the debt collector must include: 1) a statement  
 16 that unless the consumer; 2) within thirty days after the receipt of the notice; 3) disputes the validity of  
 17 the debt; 4) or any portion thereof; 5) the debt will be assumed valid by the debt collector. “Congress  
 18 included the[se] debt validation provisions in order to guarantee that consumers would receive adequate  
 19 notice of their legal rights.”<sup>72</sup>

20 Instead, Defendant’s letter contains the sentence, “If you tell us of your dispute within 30 days  
 21 of your receipt of this letter, we will avoid contacting you until we send written verification of the debt  
 22 or a copy of any applicable judgment. If you do not tell us you dispute the debt then we will assume the  
 23 debt is valid.” However, with a straightforward reading of the above quoted language in the initial

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 28       <sup>69</sup> *Swanson*, 869 F.2d at 1225.  
 29       <sup>70</sup> 15 U.S.C. § 1692g(a)(3).  
 30       <sup>71</sup> *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997) (*citing United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

collection letter, it is clear that the notice does not notify the least sophisticated debtor that he may dispute only a portion of the debt.

The language of the notice is simply not sufficient to put a debtor on notice that he could dispute a portion of the debt. A debtor who does owe a valid obligation to the creditor but could dispute finance charges, interest, or have some valid defense, might not be put on notice that he could dispute these additional charges.<sup>72</sup>

Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. § 1692g(a)(3). Therefore, Defendant's Motion to Dismiss should be denied as to this claim.

**3. The Complaint Sufficiently Alleges Facts to State a Claim Under 15 U.S.C. § 1692g(a)(4).**

Defendant argues that there is no violation of 15 U.S.C. § 1692g(a)(4) because the letter contained all statutorily required information. Plaintiff disagrees. As stated above, the notice required by § 1692g(a)(4) must convey to the least sophisticated debtor:

. . . a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector[.]<sup>73</sup>

Defendant's letter violates section g(a)(4) for two reasons. First, the letter fails to inform the Plaintiff that he must dispute the debt *in writing* to preserve his right to receive verification of the debt. Second, the letter fails to notify the Plaintiff that any portion of the debt can be disputed to trigger the right to receive a verification.

As to the first violation, the court in *McCabe v. Crawford & Company*,<sup>74</sup> found a violation of § 1692g(a)(4) in a collection letter that read in relevant part:

Unless we hear from you within thirty (30) days after the receipt of this letter disputing this claim, Federal Law provides that this debt will be assumed to be valid and owing. In the event you contact us and dispute

<sup>72</sup> *Baker*, 677 F.2d at 778.

<sup>73</sup> 15 U.S.C. § 1692g(a)(4).

<sup>74</sup> 272 F. Supp. 2d 736 (N.D. Ill. 2003).

1                   the charges owed, we will promptly furnish you with any and all  
 2                   documentation to substantiate the claim.<sup>75</sup>

3                   The court held that:

4                   Section 1692g(a) dictates that the debt collector shall send the consumer a  
 5                   written notice stating that upon *written* notification of a dispute,  
 6                   verification *must* be provided by the debt collector. 15 U.S.C. § 1692g(a)  
 7                   (4). [Debt collector] correctly asserts that § 1692g(a)(4) does not  
 8                   expressly prevent the debt collector from providing verification of the  
 9                   debt upon *oral* notification of the dispute. However, [debt collector]  
 10                  misses the point of the protection found in § 1692g(a)(4). Although a  
 11                  debt collector *may* provide verification upon *oral* notification, the debt  
 12                  collector *must* provide verification upon *written* notification. If the debtor  
 13                  gives only oral notification of the dispute, the FDCPA imposes no  
 14                  requirement on the debt collector to obtain verification of the debt. See  
 15                  *Fasten v. Zager*, 49 F. Supp. 2d 144, 149 (E.D.N.Y. 1999) (holding that  
 16                  the debt collector was not required to obtain verification upon oral  
 17                  notification of the dispute). Thus, by omitting the words “in writing,”  
 18                  [debt collector] did not effectively convey to the consumer his rights  
 19                  under the FDCPA and thus violated the Act.<sup>76</sup>

20                  As to the second violation, the Ninth Circuit in *Baker v. G.C. Servs. Corp.*, found a violation of  
 21                  § 1692g(a)(4) in a collection letter that read in relevant part:

22                  Verification of this debt, a copy of judgment or the name and address of  
 23                  the original creditor, if different from the current creditor, will be  
 24                  provided if requested in writing within 30 days. Otherwise, the debt will  
 25                  be assumed to be valid.<sup>77</sup>

26                  Construing this language the court held that:

27                  The clear language of the statute explicitly requires that a debtor shall be  
 28                  given notice that he may “dispute the validity of the debt, or any portion  
 29                  thereof . . . .” 15 U.S.C. § 1692g(a)(3). “In construing a statute we are  
 30                  obliged to give effect, if possible, to every word Congress used.” *Reiter*  
 31                  *v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331, 60 L. Ed. 2d  
 32                  931 (1979). Congress clearly required the notice to inform the debtor that  
 33                  he could dispute any portion of the debt.<sup>78</sup>

34                  Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. § 1692g(a)(4).

25                  <sup>75</sup> *Id.* at 738.

26                  <sup>76</sup> *Id.* at 743 (emphasis in original).

27                  <sup>77</sup> *Baker*, 677 F.2d at 776.

28                  <sup>78</sup> *Id.* at 778.

1 Therefore, Defendant's Motion to Dismiss should be denied as to this claim.

2           **4. The Complaint Sufficiently Alleges Facts to State a Claim Under 15 U.S.C. §**  
 3 **1692g(a)(5).**

4           Defendant fully admits that, "The [letter] does not state that [Plaintiff] could, upon written  
 5 request, obtain the name and address of the original creditor, if different from the current creditor."<sup>79</sup>  
 6 Standing alone, this states a violation of 15 U.S.C. § 1692g(a)(5). Defendant argues that "there was no  
 7 need to place the substance of 15 U.S.C. § 1692g(a)(5) because the information was already provided in  
 8 the same writing."<sup>80</sup> Plaintiff disagrees. As stated above, the notice required by § 1692g(a)(5) must  
 9 convey to the least sophisticated debtor:

10           . . . a statement that, upon the consumer's written request within the  
 11 thirty-day period, the debt collector will provide the consumer with the  
 12 name and address of the original creditor, if different from the current  
 13 creditor.<sup>81</sup>

14           Defendant's argument that its collection letter provides, "the original creditor's name, the card  
 15 name, the original card number, the date the card was opened, and further offers additional assistance,  
 16 'To help you identify this debt we have provided above the name and address of the original creditor  
 17 and other information. If you need more information, just let us know.'"<sup>82</sup> However, the FDCPA does  
 18 not provide that the debt collector may provide the original creditor information in lieu of the required §  
 19 1692g(a)(5) notice, nor is the statute ambiguous in this regard. Therefore, Defendant may not  
 20 legitimately claim that it has complied with the FDCPA as a matter of law. To the extent Defendant is  
 21 arguing that it has complied with the "spirit" of the statute, that determination is a question of fact, and  
 22 not appropriate for a Motion to Dismiss. Even if the Court were to entertain Defendant's argument that  
 23 providing original creditor information in the initial notice relieves a debt collector of the duty to

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 26           <sup>79</sup> Memorandum in Support of CFS II, Inc.'s Motion to Dismiss the Complaint (hereinafter "Motion to  
          Dismiss") at ¶ 28.

27           <sup>80</sup> Motion to Dismiss at ¶ 29.

28           <sup>81</sup> 15 U.S.C. § 1692g(a)(5).

29           <sup>82</sup> Motion to Dismiss at ¶ 28.

1 include a § 1692g(a)(5) notice, Defendant in this case did not provide all the information contemplated  
 2 by § 1692g(a)(5). Specifically, Defendant's letter failed to include the address of the original creditor.  
 3

4 Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. § 1692g(a)(5).  
 5 Therefore, Defendant's Motion to Dismiss should be denied as to this claim.  
 6

7 **5. The Complaint Sufficiently Alleges That Defendant Misrepresented Plaintiff's  
 8 Right to Dispute the Debt, In Violation of 15 U.S.C. §§ 1692e and 1692e(10).**

9 15 U.S.C. § 1692e provides that, “[a] debt collector may not use any false, deceptive, or  
 10 misleading representation or means in connection with the collection of any debt.  
 11 . . .  
 12

13 (10) The use of any false representation or deceptive means to collect or attempt to collect any  
 14 debt or to obtain information concerning a consumer.”  
 15

16 As discussed above, Defendant's letter fails to notify the least sophisticated debtor of his  
 17 validation rights. Therefore, Defendant's collection letter contains false representations which were  
 18 made while attempting to collect a debt. This states a violation of 15 U.S.C. §§ 1692e and 1692e(10).<sup>83</sup>  
 19

20 Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. §§ 1692e and  
 21 1692e(10). Therefore, Defendant's Motion to Dismiss should be denied as to this claim.  
 22

23 **6. The Complaint Sufficiently Alleges That Defendant Misrepresented Plaintiff's  
 24 Right to Obtain Verification of the Debt, In Violation of 15 U.S.C. §§ 1692e and  
 25 1692e(10).**

26 As discussed above, Defendant's letter fails to notify the least sophisticated debtor that he must  
 27 dispute the debt *in writing* to preserve his or her right to receive verification of the debt. Second, the  
 28 letter fails to notify the least sophisticated debtor that any portion of the debt can be disputed to trigger  
 29

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30 <sup>83</sup> See *Vera v. Trans-Continental Credit & Collection Corp.*, 1999 U.S. Dist. LEXIS 3464, \*10  
 31 (S.D.N.Y. Mar. 23, 1999) (“For essentially the same reasons that I conclude that the debt validation  
 32 notice violates § 1692g(a)(3), I also conclude that the notice violates § 1692e(10.”); *Tipping-Lipshie v.*  
*Riddle*, 2000 U.S. Dist. LEXIS 2477, \*10 (E.D.N.Y. Mar. 1, 2000) (“misleading validation notice  
 33 violates both sections 1692g and 1692e(10”)).

1 the right to receive a verification.

2 Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. §§ 1692e and  
 3 1692e(10). Therefore, Defendant's Motion to Dismiss should be denied as to this claim.  
 4

5 **7. The Complaint Sufficiently Alleges That Defendant Misrepresented Plaintiff's  
 Right to Obtain the Name and Address of the Original Creditor, If Different From  
 the Current Creditor, In Violation of 15 U.S.C. §§ 1692e and 1692e(10).**

6  
 7 As discussed above, Defendant admits that it failed to send Plaintiff a written notice containing  
 8 a statement that upon Plaintiff's written request, Defendant would provide Plaintiff with the name and  
 9 address of the original creditor, if different from the current creditor.  
 10

11 Based on the foregoing, Plaintiff has sufficiently pled a violation of 15 U.S.C. §§ 1692e and  
 12 1692e(10). Therefore, Defendant's Motion to Dismiss should be denied as to this claim.  
 13

14 **8. Because the California RFDCPA Incorporates Most of the Provisions of the  
 Federal FDCPA by Reference, a Determination That Defendant Violated the  
 FDCPA Supports an Additional Award of Statutory Damages Under the RFDCPA.**

15 Defendant argues that Plaintiff has failed to state a claim under the California RFDCPA.  
 16 However, the RFDCPA incorporates the federal FDCPA by reference.<sup>84</sup> Therefore, a Complaint  
 17 sufficiently alleges a violation of the FDCPA, also sufficiently alleges a violation of the RFDCPA.  
 18 Therefore, Defendant's Motion to Dismiss should be denied as to this claim.  
 19

20 **IV. CONCLUSION**

21 Why would a debt collector feel the need to modify the validation notice in the way this debt  
 22 collector has done? It is fair to assume that there is some reason. Could it be to confuse  
 23 unsophisticated consumers about their rights "under a cover of technical compliance[?]"<sup>85</sup>  
 24

25 In judging the actions of a debt collector, we invariably ask whether the information it  
 26 provided was or its actions were confusing or misleading. Quite simply, we seek to  
 27 ensure that even the least sophisticated debtor is able to understand, make informed  
 decisions about, and participate fully and meaningfully in the debt collection process.

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28 <sup>84</sup> Cal. Civil Code § 1788.17.

<sup>85</sup> *Miller*, 943 F.2d at 485.

That goal—and, therefore, the least sophisticated debtor standard—is no less important or relevant when considering the actions of the debtor than when considering the actions of a debt collector. Most important, because the FDCPA is a remedial statute aimed at curbing what Congress considered to be an industry-wide pattern of and propensity towards abusing debtors, it is logical for debt collectors—repeat players likely to be acquainted with the legal standards governing their industry—to bear the brunt of the risk. As we have oft repeated, it does not seem “unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”<sup>86</sup>

Plaintiff’s Complaint has sufficiently alleged facts that, if established at trial, would entitle him to relief against Defendant for numerous violations of the FDCPA and RFDCPA, any one of which exposes Defendant to liability. Defendant has failed to demonstrate that its collection letter complies with the requirements of the FDCPA and RFDCPA as a matter of law. Further, Defendant acknowledges that “pursuant to the RFDCPA via California Code of Civil Procedure 1788.17, the substance of the FDCP A §§ 1692b to 1692k, [is] applicable as a matter of California state law.”<sup>87</sup> Plaintiff respectfully requests that this Court deny Defendant’s Motion to Dismiss in its entirety and find that Plaintiff’s Complaint states claims upon which relief may be granted by this Honorable Court.

CONSUMER LAW CENTER, INC.

Dated: April 23, 2012

By: /s/ Fred W. Schwinn

Fred W. Schwinn, Esq.  
Attorney for Plaintiff  
BRUCE ALBERT JOHNSON

<sup>86</sup> *Clark*, 460 F.3d at 1171-1172 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965)) (internal citations omitted) (emphasis added).

<sup>87</sup> Motion to Dismiss at ¶ 9.